IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 294 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAWAL CHHANALAL SHIVRAM

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 294 of 1992
   MR JM BUDDHBHATTI for Petitioner
   MR BD DESAI-PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 04/02/2002

ORAL JUDGEMENT

#. The petitioner above named has preferred this Criminal Revision Application under Section 397 read with 401 of the Criminal Procedure Code, 1973, against the judgments and conviction orders recorded by the two

Courts below for the offence punishable under Section 377 of the I.P.C.

#. The petitioner was initially convicted for the said offence in Criminal Case No.14/1992 by the learned Chief Judicial Magistrate, Mehsana by his judgment and order dated 30.6.1992 and he was sentenced to suffer R.I. for 5 years. He was directed to pay fine of Rs.5,000/- for the said offence punishable under Section 377 of the I.P.C. In default of payment of fine, he was directed to undergo further S.I. for 1 year. The learned Chief Judicial Magistrate also directed that in case of recovery of fine of Rs.3,000/- an amount of Rs.2,500/shall be paid by way compensation to the victim Kaushikkumar.

#. The present petitioner carried the said order before the Sessions Court at Mehsana by way of Criminal Appeal No.39/1992. The learned Additional Sessions Judge at Mehsana dismissed the said appeal of the present petitioner and confirmed the judgment and conviction order recorded by the learned Chief Judicial Magistrate, Mehsana by order dated 29.8.1992.

#. Feeling aggrieved by the aforesaid two judgments and conviction orders recorded by the two Courts below, the petitioner has preferred this Revision Application before this Court.

#. The petitioner has contended in this Revision Application that there was delay in filing FIR and that has not been properly considered by the two Courts below. That the improvements made by the victim - Kaushikkumar during the course of cross-examination have not been properly appreciated by the two Courts below. That the two Courts below have not considered the fact that the entire episode put forward by the victim is improbable and, therefore, the two Courts below have committed illegality in accepting the versions given by the witnesses. That even otherwise the judgments and orders of two Courts below are illegal and perverse and deserve to be set aside.

#. The petitioner has, therefore, prayed that the present Revision Application be allowed, the judgments and conviction orders of the two Courts below be quashed and set aside, that the petitioner herein be acquitted of the charge levelled against him and his bail bond may be cancelled.

#. On receipt of this Revision Application rule was

issued and Mr.B.D.Desai learned APP appears for the State. I have heard Mr.M.M.Barot, learned Senior Advocate for the appellant with Mr.Budhbhatti. I have also heard Mr.B.D.Desai, learned APP for the State.

#. The learned Senior Advocate for the petitioner has contended that looking to the nature of the offence committed by the petitioner and looking to the status he is enjoying in the society and looking to the fact that the petitioner has lost his service on account of the present prosecution and looking to the fact that he has suffered paralitic attack, this would be a fit case wherein the Court should extend the benefit of probation under the provision of Probation of Offenders Act, 1958.

#. As per the case of the prosecution the present petitioner, original accused in Criminal Case No.14/1992 before the learned JMFC, Mehsana, was a teacher in a Primary School at Vadnagar in Mehsana District and the victim of the offence - Kaushikkumar, then aged about 12 or 13 years, was his student. On 27.12.1991 at about 1700 or 1725 hours; after the school time was over and the students had left, the petitioner took the victim near toiles. He was asked to remove his clothes and to lie down on the ground on his chest and stomach. The petitioner also removed his clothes and attempted homosex with him. In the meantime, the boy tried to get up. Hence the petitioner also got up. The boy put up his clothes and tried to go away. At this, the petitioner stopped him and forcibly placed his male organ in the mouth of the said boy. Some staff members saw this second episode from the window and shouted at the petitioner. This shows that the petitioner voluntarily had carnal intercourse against the order of nature with the boy in question, particularly shown as an unnatural offence. Undisputedly penetration in the mouth of the victim also amounts to an unnatural offence.

##. As said above the learned Senior Advocate has not pressed the Revision Application on merits and he has not argued the matter on merits. He has, however, argued that having regard to the facts of the case, nature of offence, age of the petitioner and the fact that he has lost his job, this is a fit case for extending the benefit of probation under the Probation of Offenders Act, 1958.

##. Learned APP Mr.Desai has strongly objected to the aforesaid suggestion and has submitted that looking to the nature of the offence it would be unjust and improper

to extend the said benefit of the petitioner.

##. It is required to be considered that the petitioner was a teacher of a Primary School and the victim was a student of about 12 years studying under him at the time when the incident took place. When the minor children have been sent to the school, their guardian would entrust their children in trusteeship or guardianship of the teachers. The teachers become the guardians and almost the fathers of the students coming to them for their study. Looking to the aforesaid capacity of the petitioner as well as of the minor victim, I am of the opinion that it would be highly improper and unjust to extend the benefit of probation to the present petitioner.

##. Even looking to the nature of the offence and the manner in which it has been committed by the petitioner, it is required to be considered that the victim was a minor boy of nearly 12 years of age and he had gone to school for learning something from the present petitioner and instead of that, the minor has been made to be a victim of unnatural offence in the school compound itself. The schools are known to be the temples of learning i.e. the temple of Goddess Saraswati. If the petitioner who can be treated to be a priest of such a temple, has committed the offence punishable under Section 377 of the I.P.C. and that too with respect to a minor student coming to the school for learning, it would set a bad example if such teachers are not sent behind the bar. It is true that the petitioner may have suffered something because of the aforesaid incident. The learned Senior Advocate has shown an order dated 16.3.1998 issued by the District Primary Education Officer of Primary Education Committee, Mehsana. This order showed that the petitioner was relieved on account of attaining the age of superannuation on 31.3.1998. This shows that the petitioner had completed 58 years of age in 1998 and, therefore, he was directed to be relieved from the service with effect from 31.5.1998 i.e. at the end of the academic term.

##. Another order shown to me is of 1997 passed by the said Officer suspending the present petitioner from the service, since the petitioner was in police custody for over 48 hours. It is not much in dispute that if a servant remains in jail for custody for more than 48 hours, then under the rules he would be deemed to be under suspension for the period for which he remains in custody. Mr.Barot has argued that even subsequently the petitioner was continued him to be under suspension till

his retirement.

##. It appears that because of the pendency of Criminal Appeal the Department does not appear to have taken departmental action against the petitioner for the aforesaid misconduct touching moral turpitude. At the same time it appears from the order dated 16.3.98 the petitioner remained in service till the date of his superannuation and he must have been given the consequential benefits also. Therefore, till the date of his retirement, by and large he had not suffered great deal of financial loss, since even his subsistence allowance would be seventy five percent of his salary after six months from the date of suspension.

##. It is further submitted that the petitioner has suffered paralytic attack. However, even during the span for which he is required to suffer imprisonment the petitioner will naturally get all medical aids in the jail also. Medical Officers are provided to see the health of the prisoners and they provide medical treatment and such medical treatments are being extended to all the prisoners. Therefore, merely because the petitioner had subsequently suffered paralytic attack, it would not be a ground for extending the benefit of probation to him.

##. The learned Senior Advocate for the petitioner has referred a decision of Fazal Rab Choudhary vs. State of Bihar, reported in AIR 1983 Supreme court 323. There also the appellant was convicted for the offence punishable under Section 377 of the I.P.C. It was observed that there was good prima facie material on record and, therefore, the sentence was reduced to six months. Initially, he was sentenced to suffer R.I. for 3 years.

##. Another decision of the Supreme Court referred by the learned Senior Advocate for the petitioner, was a case of State of Karnataka vs. Muddappa, reported in (1999)5 Supreme Court Cases 732. There the offence was one punishable under Part-II of Section 304 of the I.P.C. The accused was released on probation. The Supreme Court found that there was no bar against the grant of such a benefit and therefore the Hon'ble Supreme Court did not interfere with the said judgment.

##. Here the facts are different. The offence is committed by a teacher with respect to his student of a minor age. The petitioner is shown to have his birth date to be 5.3.1940, as per the order of the District

Primary Education Officer referred to hereinabove. The offence in question was committed by him on 27.12.1991. The petitioner was around 51 years of age at the date of the said offence. He was not, therefore, very young or below the age of 21 years at the date of the offence. The offence was committed in the school compound. Even though the school time was over and the students had left the school, the incident was witnessed even by some staff members of the said school. Having regard to the facts of the case, nature of the offence, status of the petitioner, status of the victim, the age of the petitioner as well as of the victim, the place of offence and the relationship between the petitioner and the victim I am of the opinion that this is not a fit case for extending the benefit of probation. At the same time, it is found that the learned Magistrate had sentenced the petitioner to suffer R.I. for 5 years. This conviction and sentence have been confirmed in Criminal Appeal. Looking to the present physical condition of the petitioner at present and looking to the age of the petitioner at the time when offence was committed, I am of the opinion that this is a fit case wherein substantive sentence can be reduced from five years to 3 years. No other point has been raised or argued by the learned advocate for the petitioner.

##. In above view of the matter, this Criminal Revision Application is partly allowed. The conviction orders recorded against the petitioner by two Courts below for the offence punishable under Section 377 of the I.P.C. is ordered to be confirmed. The order of the learned Chief Judicial Magistrate, Mehsana directing the petitioner to pay fine of Rs.3,000/- and to undergo R.I. for 1 year in default of payment of fine is ordered to be confirmed. The order of the learned Chief Judicial Magistrate, Mehsana directing payment of Rs.2,500/- from the amount of fine if paid by the petitioner to the victim - minor Kaushik by way of compensation is also ordered to be confirmed.

##. However, the petitioner is directed to suffer R.I. for 3 years instead of 5 years that has been ordered by the learned Chief Judicial Magistrate, Mehsana and confirmed in Criminal Appeal by the Sessions Court, Mehsana. Therefore, this Criminal Revision Application is partly allowed to the above extent. The petitioner appears to be on bail and, therefore, he shall forthwith surrender. In case he does not surrender within 4 weeks non bailable warrant shall be issued against him. Intimation to the surety shall be issued with a view to have proper compliance of this order. Rule is partly

made absolute to the above extent.

(D. P. BUCH, J.)

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